In the

Supreme Court of the United States

OCTOBER TERM, 1944

No. .....

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Petitioner,

v.

MRS. G. J. RILEY, ADMINISTRATRIX OF THE ESTATE OF G. J. RILEY, DECEASED,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINION OF COURT BELOW

The official report of the opinion of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas at Texarkana, is reported in 183 S. W. (2d) 999, and appears on Pages 127 to 136 of the printed record filed herein, to which reference is here made.

GROUNDS OF JURISDICTION

A statement of the grounds on which the jurisdiction of this Honorable Court is invoked is contained in the foregoing petition and is here adopted.

CONCISE STATEMENT OF THE CASE

A statement of the case containing all that is material to the consideration of the questions presented, with appropriate references to the printed record is contained in the foregoing petition and is here adopted.

SPECIFICATION OF ASSIGNED ERRORS

A specification of such of the assinged errors as are intended to be urged is set forth in the appendix to the foregoing petition, to which reference is here made.

POINTS PRESENTED AND ARGUMENT

SUMMARY OF ARGUMENT

I. The Court of Civil Appeals erred in holding that the trial court properly overruled petitioner's motion for an instructed verdict and its motion for judgment non obstante veredicto.

A. There is no evidence to support the finding of the jury that the stakes holding the load of piling on the south side of the car were negligently cut to such extent by employees of the defendant, other than deceased, so as to cause the entire load of piling to give way when the deceased, Riley, cut the wire at the west end of the car.

1. There is no evidence that either of the two end stakes were cut to any extent by employees of defendant, other than deceased. They were hacked with an axe and deceased is the only person shown to have had an axe on the occasion in question.

2. There is no evidence as to what extent said two remaining stakes were cut.

3. The circumstances were not sufficient to support such finding.

(a) Such negligence must be shown by direct evidence.

(b) The unloading was handled in the usual and customary manner.

(c) Experienced men on the job were more capable of judging whether the unloading was handled in a proper way than was the jury.

(d) The circumstances show no more than an inherently dangerous operation which is not actionable.

(e) The circumstances are not strengthened by the failure of petitioner to offer merely cumulative evidence.

B. There is no evidence to support the finding of the jury that negligence in cutting the stakes on the south side was a proximate cause of the fatal injuries resulting from the piling falling off the north side.

1. *Under natural laws* (over which courts have no control) the weakening of the stakes on the south side would correspondingly strengthen the stakes on the north side so as to render them less likely to give way.

2. The falling of the load to the north was unusual and unforeseeable.

3. The injuries just as likely arose from some other causes, such as a latent defect in the wire on the east end or a hidden defect in the stakes on the north side, and such finding is therefore based on speculation and pyramiding presumptions.

C. There is no evidence to support the finding of the jury that defendant negligently failed to furnish the deceased a reasonably safe place to work under the conditions existing.

1. There is no evidence of any defect in the place where the piling had to be unloaded, nor is there any evidence of any other kind of a place that should have been furnished, nor that defendant failed to do anything that was ordinarily done or that it could have done.

2. There is no evidence of any way in which the place could have been made safer.

D. There is no evidence to support the finding of the jury that negligence in failing to furnish a reasonably safe place for work to deceased was a proximate cause of the fatal injuries of deceased.

1. The work of unloading piling was inherenntly dangerous and had to be performed where the piling was needed and the mere happening of the accident is no evidence of failure to furnish a reasonably safe place to work. The jury evidently mistook an inherently dangerous operation for failure to furnish a safe place for work.

2. Regardless of the safety of the place for work, the piling falling on deceased would have killed him just as dead.

E. Failure of respondent to make out a case on the specific negligence alleged can not be cured by the doctrine of res ipsa loquitur.

1. Right to recover under res ipsa loquitur doctrine was waived by no issue being submitted or requested thereon.

2. Instrumentality was partly under control of deceased, who was the most experienced man on the job and was taking the lead in unloading the piling.

3. The facts were fully developed by the eye witnesses used by plaintiff.

4. The doctrine of res ipsa loquitur is not applicable to such a suit under the Federal Employers' Liability Act.

II. The court erred in not holding, if there was any evidence of negligence proximately causing Riley's death, that Riley was guilty of contributory negligence either solely causing or proximately contributing to cause his injuries.

A. The deceased was experienced in unloading piling, took the lead in the unloading operation, and cut the wire himself, and if he could not foresee the disasterous result neither could defendant be charged with such foresight.

III. The Court of Civil Appeals erred in holding that the judgment for Thirty Thousand and No/100 ($30,000.00) Dollars was not excessive.

A. The proper measure of reimbursement to allow beneficiaries for the reasonable expectation of pecuniary benefits that would have resulted from the continued life of deceased, arrived at by determining an amount, which, capitalized at a reasonable rate of interest, would yield annually the same income the person injured might have expected from the deceased, using the interest and part of the capital from year to to year, amounted to only Twelve Thousand One Hundred Ninety-five and 39/100 ($12,195.39) Dollars, and the income alone from Thirty Thousand and No/100 ($30,000.00) Dollars would exceed deceased's entire income.

B. Deceased only earned money while away from home and the value of the nurture, care and education the three minor children would have received from deceased during their minority could not make up the difference between Twelve Thousand One Hundred Ninety-five and 39/100 ($12,195.39) Dollars and

Thirty Thousand and No/100 ($30,000.00) Dollars, and certainly could not account for the Fifteen Thousand and No/100 ($15,000.00) Dollar allowance to the widow.

POINT NO. I

The Court of Civil Appeals erred in holding that the trial court properly overruled petitioner's motion for an instructed verdict and its motion for judgment non obstante veredicto.

Argument under Point No. I

At the conclusion of the evidence in the trial court, the petitioner made a motion for an instructed verdict in compliance with Rule 268 of the Texas Rules of Civil Procedure*, setting forth as the specific grounds therefor the matters herein erred. (R. 7-9.)

The trial court overruled such motion (R. 9) and submitted the case to the jury on special issues limited to three specific allegations of negligence. (R. 10-12.) Respondent requested the submission to the jury of no other issue. Under the Texas practice, all other possible grounds of recovery were waived†. The jury answered all of such issues favorable to respondent and petitioner made a motion for judgment in its favor non obstante veredicto (R. 25-31)

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* Said rule 268 reads: "A motion for directed verdict shall state the specific grounds therefor."

† Rule 279 of the Texas Rules of Civil Procedure provides: "* * * Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived; * * *."

under Rule 301 of Texas Rules of Civil Procedure*. It thus remains to be seen whether there is any substantial evidence to support the findings of the jury on any one of such three specific grounds of alleged negligence. The evidence is all narrated on Pages 152 to 174 of the appendix to this brief, to which reference is here made and conspicuous by its absence is any evidence of negligence of petitioner proximately causing the injuries to the deceased.

In response to the special issues submitted to it, the jury found that petitioner was negligent in that the stakes holding the load of piling on the south side of the car were cut to such extent by employees of defendant other than deceased so as to cause the entire load of piling to give way when the deceased, Riley, cut the wire at the west end of the car, in that the car of piling was overloaded at the time the crew under Mr. Waters attempted to unload same and in that the defendant failed to furnish the deceased a reasonably safe place to work under the conditions existing, and that such negligence was a proximate cause of Riley's injuries.

The Court of Civil Appeals set side such finding as to any negligence in overloading the car of piling on the ground that same was without support by any evidence, and since such finding has not been attacked or appealed from, it has become final. Petitioner will, therefore, consider further only the matters of the extent of the cutting

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* Said Rule 301 provides: "* * * Provided, that upon motion and reasonable notice the court may render judgment non obstante veredicto if a directed verdict would have been proper, and provided further that the court may, upon like motion and notice, disregard any Special Issue Jury Finding that has no support in the evidence. * * *"

of the stakes on the south side and the matter of furnishing a safe place to work, and whether either could have been a proximate cause of Riley's injuries, as held by the Court of Civil Appeals with the aid of the res ipsa loquitur rule of evidence (which we shall see presently is wholly inapplicable to this case and the circumstances).

A. No Evidence of Negligence of Petitioner in Cutting Stakes.

The finding that the stakes holding the load of piling on the south side of the car were cut to such extent by employees of defendant other than deceased as to cause the entire load of piling to give way when deceased, Riley, cut the wire at the west end of the car has absolutely no support in the evidence. In a futile attempt to show that the two end stakes on the south side were cut by an employee of defendant other than Riley, petitioner can cite only the testimony of the witness R. E. Nelson, as follows:

"Q. Did you use the saw on any of those stakes?

"A. I didn't.

"Q. Did you notice anybody else using one?

"A. I recall Doug Waters and Walter Byles using a saw on one stake.

"Q. Which end of the car was that on?

"A. The west end." (R. 103.)

Such testimony pertains to sawing on the second stake from the south end which was completely removed. (R. 115-116, 99.) The end stakes were not sawed but were hacked with an axe (R. 74) and Riley is the only person shown

to have had an axe. (R. 112.) Plaintiff's witness Byles testified that the only stake he and Waters sawed was the second stake from the end which was completely removed. (R. 115-6.) Such specific testimony* precludes any possible inference that Byles and Waters sawed the stake at the extreme west end of the south side of the car. The record is devoid of any evidence as to who cut the stake at the east end of the south side of the car. (R. 111.)

Neither is there any evidence that the two end stakes were cut too deep. In an abortive attempt to show that the two end stakes were cut too deep, respondent can cite only the following isolated excerpts from the testimony of R. E. Nelson:

> "Q. I believe you said that you were at the west end of this piling car on the south side?
>
> "A. Yes, sir.
>
> "Q. That was the side where you expected and believed that the piling would come off on?
>
> "A. Yes, sir.
>
> "Q. You believed that because you had taken out all the stakes except the two end stakes?
>
> "A. As well as I knew.
>
> "Q. And they had weakened as you customarily weakened them?
>
> "A. Yes, sir.

* In the case of **Penn. R. R. Company v. Chamberlain**, 288 U. S. 333, this Honorable Court said: "And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proved facts and this is not pemissible in face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the facts sought to be inferred did not exist."

"Q. And you expected that load when it was cut like it always had been to shift to the side where there were virtually no stake and roll off on that side?

"A. Yes, sir." (R. 106.)

In grasping vainly at a straw, respondent seeks to remove such testimony from its setting and to interpret same erroneously to mean that the stakes were cut to exactly the same depth as stakes have been cut on smaller loads. Such strained construction is clearly precluded by the further testimony of this same witness that he does not recall seeing any axe work (R. 104) when the uncontroverted evidence is that the two end stakes on the south side were notched with an axe. (R. 74.) Undoubtedly, when taken in connection with the context, such testimony pertains to the general method and manner of weakening the stakes, rather than to the specific extent and depth to which they were cut. Such testimony is strongly in petitioner's favor since *the weakening of the stakes in the usual and customary manner would tend to negative any negligence*, and respondent's attempt to turn the tables on such damaging testimony to her falls flat.

It is well established that in this kind of a case the plaintiff must establish negligence by *direct* evidence*. This Honorable Court said in the case of *Patton v. Texas and Pacific Ry. Co.*, 179 U. S. 658, 21 S. Ct. 275, 45 L. Ed.

* In the case of **Southern Ry. Co. v. Stewart**, 115 F. (2d) 317, on Page 322, the court said: "A presumption in the performance of duty attends the defendant as well as the person killed. It must be overcome by direct evidence. One presumption can not be built on another." (Emphasis added.)

361, in reference to the rule obtaining in the case of an injury to an employee:

> "The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. Texas & Pacific Railway v. Barrett, 166 U. S. 617. Second. That in the latter case, it is not sufficient for the employee to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for a jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs. * * * No one can say from the testimony how it happened that the step became loose. Under those circumstances, it would be trifling with the rights of parties for a jury to find that the plaintiff had proved that the injury was caused by the negligence of the employer."

A case directly in point is the case of *Entsminger v. Yazoo & Mississippi Valley R. Co.*, 142 F. (2d) 592 (Fifth Circuit), in which the plaintiff was seriously injured while assisting in unloading a car of poles when the stakes on the unweakened as well as the weakened side gave way and the load fell off both sides of the car. The trial court

instructed a verdict for defendant and the Circuit Court of Appeals affirmed such judgment holding:

> "The evidence established that the *customary* mode of loading the car with logs for shipment was complied with in this case." (Emphasis added.)

The uncontroverted testimony in the case at bar is that the car of piilng was loaded in the customary and usual manner and was wired in the customary and usual manner and was unloaded in the customary manner by first removing all the stakes on one side except the end stakes on the side you expect them to come off and after this is done, the end stakes on the side you expect the load to go off on are hacked or weakened and then all the wires except the top wire on the end stakes are cut and that was the practice and custom in Bridge and Building work of railroad companies and that was the practice they used in this case and they did not deviate from the customary and usual practice in unloading those poles. (R. 84-86.)

In 20 *R. C. L.* 30, the rule is thus stated:

> "Every one may rightfully rely upon experience and as a rule he is not to be charged with negligence in respect of acts which conform to a practice that existed for years without resulting in any injury."

In the case of *Canadian Northern Ry. Co. v. Walker*, 172 F. 346, the court says on Page 352:

> "Skilled and experienced railroad operators are more competent than jurors or judges to choose methods of operating railroads, and when a railroad company, as in this case, has selected and adopted a customary method of loading and unloading its cars and removing temporary obstructions necessarily used in that work, which is neither palpably unreasonable nor

clearly dangerous, it owes servants no duty to adopt a different method and it can not be held guilty of negligence because it has not done so."

The Sixth Circuit of Appeals uses the following language in the case of *Hylton v. Southern Ry. Co.*, 87 F. (2d) 393:

> "Further, there is a fatal infirmity in the new ground of negligence alleged. It involves an engineering problem of railroading, and the judgment of the engineers of the railroad company may not be reviewed by a jury with the view of finding actionable negligence. The change in the rule, and the omission of the requirement of turning retainer valve handles up, involved a survey of the grades and the brake system employed by the railroad company. The judgment of the railroad company's engineers in reaching the conclusion it did, may not be reviewed by a jury."

To the same effect is the holding in the case of *Louisville & Nashville R. R. Co. v. Davis*, 75 F. (2d) 849, wherein the court said:

> "The rule is well settled that the master is not bound to use the safest and best method or contrivance to meet the legal requirement of reasonable care, and that in any event reasonable engineering and scientific judgment is not subject to review by a jury."

The respondent seeks to *accentuate* the *negative*. She seeks to make out a case upon petitioner's lack of evidence, rather than from the force of any testimony offered in evidence. The witnesses who testified gave all the details of the occurrence, and petitioner should be commended rather than penalized for not offering cumulative evidence. The circumstances showing just what took place were fully developed and undisputed. The rule relied upon by respon-

dent pertaining to the failure of one party to offer explanations strengthening the other party's evidence, clearly has no application where, as here, there is no evidence of any negligence or proximate cause for it to strengthen, but respondent's own witnesses testified to the facts fully and negatived any negligence or proximate cause. The rule under such circumstances is thus stated in 17 *Tex. Jur.* 305-307:

> "No presumption arises from the failure of a party to produce evidence where there is no duty resting upon him to disclose the facts, or where the burden is on the opposite party to sustain the affirmative of the issue, nor from the failure to introduce evidence which is equally available to both parties. * * *
>
> "But this rule has no application until the plaintiff has made out a prima facie case against the defendant, nor where the plaintiff himself introduces testimony which overcomes any presumption that the defendant is in possession of any other evidence on the subject."

Under the above rules, it is respectfully submitted that the evidence in this case wholly fails to show that petitioner did anything it should not have done or failed to do anything it should have done on the occasion in question in connection with the weakening of the stakes on the south side of the car and there is no showing of negligence and no showing of anything except an injury arising from an inherently dangerous operation which was a risk which deceased chose to take in engaging in such occupation.

B. Cutting Stakes Not Proximate Cause.

Assuming for the sake of argument only that the stakes on the south side were cut too deep, still that could not be

the proximate cause of the stakes on the north side giving way. The cause of Riley's injuries were the stakes on the north side breaking; he jumped or fell to the north side of the car and the piling that rolled off the north side of the car crushed him to death. The more the stakes on the south side were weakened, the less likely it was that the stakes on the north side would break. *This is an unrefutable physical law.* Such contention is fully borne out by the holding in the case of *Stokes v. Burlington-Rock Island R. Co.*, 165 S. W. (2d) 229 (Texas Court of Civil Appeals, writ of error refused for want of merit), in which the facts were that all the stakes on the east side of a car of poles were removed except the two end stakes on the east side and it was expected that the load would fall to the east, but when the last two wires were cut, the load fell to the west as well as to the east and it was contended that defects in the staples or stakes along the east side of the car were the proximate cause of the accident, the deceased, in that case, being caught in the poles falling to the west, and the court held on Page 231 of the opinion:

> "It is readily apparent that no defect in the staples or standards along the east side of the car could have been a proximate cause of the accident."

Just so, in the case at bar, any defect in the standards on the south side could not have been the proximate cause of injuries resulting from the standards on the north side breaking unexpectedly.

One of the indispensable elements of proximate cause is foreseeability. It could not reasonably have been foreseen that some of the piling would fall off the north side of the

car when the first wire was cut. Nothing short of "prophetic ken" could have foreseen such results. The experienced men on the job did not expect it. The testimony of the witness, Griffin, in reference to the piling going off both sides of the car when the first of the remaining two wires was cut is typical wherein he testified:

"Q. Had that ever happened before that time?

"A. No, sir.

"Q. You had never seen it happen before in all your experience?

"A. No, sir.

"Q. You didn't expect it to happen then?

"A. No, sir.

"Q. You had no reason to think those poles would go off on the north side yourself?

"A. No, sir.

"Q. You didn't believe they would go off there, did you?

"A. No, sir.

"Q. You have been doing this kind of work a long time, haven't you?

"A. Yes, sir." (R. 92.)

Only one time had any of these experienced witnesses ever seen a load split and fall on both sides and that was after both wires had been cut. (R. 91.) Also, only one time had any of the experienced witnesses seen a load fall off when just one of the end wires was cut and that time the load all came off on the weakened side. (R. 76.) Such rare occurrences are wholly insufficient to establish the fore-

seeability or anticipation necessary to sustain a finding of proximate cause. In the recent case of *Brady v. Southern Ry. Co.*, 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 189, the court points out that there was evidence that the very thing that caused Mr. Brady's death had happened three or four times within ten years of experience by one witness, and very frequently, 25 to 50 times within the 22 years, experience of another witness, but still this Honorable Court says that the testimony was wholly insufficient to sustain a finding that the employer ought to have foreseen and antipicated that it might happen on the occasion when Brady lost his life and affirmed the judgment of the Supreme Court of North Carolina, reversing and rendering the case in favor of the employer in spite of the findings of the jury that the employer was guilty of negligence proximately causing such death, this Honorable Court using the following language:

> "There is thus presented the problem of whether sufficient evidence of negligence is furnished by the record to justify the submission of the case to the jury. In Employers' Liability cases, this question must be determined by this court finally. * * * The weight of evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury. * * * When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceedings by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial, the result is saved from the mischance of speculation over legally unfounded claims. * * * The rule as to when a directed verdict is proper,

> heretofore referred to, is applicable to questions of proximate cause. * * * Bare possibility is not sufficient. * * * Events too remote to require reasonable provision need not be anticipated. * * * Liability arises from negligence not from injury under this Act. And that negligence must be the cause of the injury. * * * The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events."

Then, too, other things than the extent of the weakening of the two end stakes just as likely or more likely caused the load to fall prematurely. For example, the wire at the east end broke immediately when the wire at the west end was cut. (R. 92.) There might have been a latent defect in the wire at the east end. Every stake on the north side broke. (R. 78-79.) There might have been some hidden defects in the stakes on the north side. It is, therefore, a matter of speculation and conjecture as to just what caused the piling to fall off the north side. One theory is just as plausible as another. The respondent failed to discharge the burden placed upon her to show that the falling of the piling to the north was more probably caused by the stakes on the south side being weakened to too great an extent than by some defect in the wire on the east end or by some defect in the stakes on the north side.

C. No Negligent Failure to Furnish Safe Place to Work.

It may be true that the unloading of a car of piling is of necessity fraught with inherent dangers. Some one must do the dangerous work. The fact that there was some risk inherent in the very nature of the work does not necessarily convict an employer of failing to furnish a reason-

ably safe place to work. The Court of Civil Appeals recognized that there was no direct evidence of failure to furnish a safe place to work. There was no showing of any loose boards, uneven place, or slick place, or anything to render the place of work any more unsafe than the very nature of the undertaking naturally and necessarily carried with it. No unnecessary peril to life or limb has been or can be shown in the condition of the premises. Surely, the jury became confused between furnishing an unsafe place to work and engaging in a necessarily hazardous line of work, and the Court of Civil Appeals reached out into thin air and grasped non-existent circumstances to support such findings.

D. Unsafe Place of Work Not Proximate Cause of Injuries.

Since there was no evidence of any failure to furnish a reasonably safe place to work, of necessity there can be no evidence of such failure being the proximate cause of Riley's injuries. The cause of the injuries was the falling of the piling to the north. Nothing about the place of work caused the piling to fall unexpectedly to the north or caused deceased to jump to the north.

The place of work was up on the car. There is no showing that Riley slipped, tripped or stumbled over anything connected with the car that caused him to either fall or jump to the north side of the car before the piling fell off the north side. The condition of the ground was not shown to be unsafe, but regardless of whether the ground was hard or soft, level or sloping, smooth or rough, the 18 piling falling off the car on top of Riley would have injured

him just the same. The place where the trouble arose was up on the car. The condition of the place of work had absolutely nothing to do with the accident in so far as the record in this case shows.

E. Res Ipsa Loquitur Not Applicable.

Since respondent pleaded specific acts of negligence and only specific negligence was submitted to the jury, respondent waived any right to recover under the doctrine of res ipsa loquitur. Rule 279 *Texas Rules of Civil Procedure, supra.* In fact respondent did not rely upon such doctrine at all, but same was summoned in desperation by the Court of Civil Appeals in an effort to bolster its foundationless opinion.

Another stumbling block in behalf of applying the doctrine of res ipsa loquitur in this case is the fact that the instrumentality was partly under the control of the injured party. He was taking the lead in the unloading operation. (R. 105.)

Illustrating the rules that both the fact that respondent relied on specific acts of negligence and that the instrumentality being partially under the control of the injured party nips in the bud any possible applicability of the doctrine of res ipsa loquitur is the case of *Stokes v. Burlington-Rock Island R. Co.*, 165 S. W. (2d) 229 (Texas Civil Appeals, writ of error refused for want of merit). In this case the facts were almost identical with the facts in the case at bar and the trial court instructed a verdict for defendant railroad company. In affirming the action of the

trial court in instructing a verdict in favor of the defendant, the court says on Page 231 of the opinion:

> "It is well settled, however, that the mere happening of an accident constitutes no legal ground for the recovery of damages unless the right of recovery be grounded upon the doctrine of res ipsa loquitur under such circumstances as to raise a presumption of negligence. Since plaintiffs allege specific acts of negligence on the part of each defendant to have been the proximate cause of the damages complained of, and since the evidence showed the thing causing the accident was not under the exclusive management of any or all of the defendants but was at least partially under the control of the injured party at and prior to the time of his injury, the rule of res ipsa loquitur has no proper application to this case. (Numerous citations.) Therefore, in order to carry the case to the jury, the burden rested upon plaintiffs to introduce some evidence tending to establish one or more of their specific allegations of actionable negligence."

Numerous Federal court cases likewise hold that the doctrine of res ipsa loquitur is not applicable to this kind of a suit where the facts were fully developed by eye witnesses and where the injured party knew as much about the existing conditions as anyone else on the job.

Petitioner respectfully submits that since there was no direct evidence of any act of negligence proximately causing Riley's injuries and since the doctrine of res ipsa loquitur is not applicable, its motion for an instructed verdict and its motion for judgment in its favor notwithstanding the verdict of the jury were both well taken and should have been granted and this court should grant this writ of certiorari and on final hearing reverse the

erroneous judgments of the courts below, to the end that justice may be done.

POINT NO. II

The Court of Civil Appeals erred in not holding, if there was any evidence of negligence proximately causing Riley's death, that Riley was guilty of contributory negligence solely causing or proximately contributing to cause his injuries.

Argument under Point No. II

The evidence of Riley's active participation in the unloading operation is undisputed. He went up on top of the load to cut the wires. (R. 76.) He climbed up on the car to cut one of those wires. (R. 77.) After he hit the wire and the piling rolled both ways, he fell off the piling or was thrown on the north side and the piling struck him. (R. 77.) He participated in the decision to let the piling fall off the south side. (R. 86.) He then took an axe and got up there and cut the wire on the west end of the car. (R. 89.) When the wire was cut, nobody was on the car but him. (R. 95.) When the time came to cut the wires Mr. Riley got up there. (R. 99.) Riley was experienced and was taking the lead in unloading that car. (R. 105.) When Byles and Waters were sawing on the west end Mr. Riley was standing with them and Mr. Riley used the axe to cut the wire and when he made a lick with the axe the piling burst and Riley went over on the north side. (R. 112.) Riley was taking the lead in unloading that car and knew more about it than anybody. (R. 113-114.) Nobody

told Riley what to do. (R. 117, 118.) Riley acted like he knew what he was doing. (R. 118.)

There are two Federal cases directly in point on the facts but which hold directly opposite to the holding of the Court of Civil Appeals in the case at bar.

In the case of *Anderson v. Southern Ry. Co.*, 20 F. (2d) 71, when the last wire was cut on a car loaded with 70 telegraph poles about 30 feet in length, each weighing in the neighborhood of 800 pounds with a space of approximately five feet between the end of the poles and the end of the car at each end, the standards broke on both sides of the car and Anderson, who cut the last wire, was so injured that he died and the plaintiffs claimed that the stakes used for holding the load in place were neither sufficient in number nor sufficiently strong and that one of the stakes was mildewed and thereby weakened. In holding that the trial court properly directed a verdict for defendant, the Circuit Court of Appeals held that Anderson was bound to have been guilty of contributory negligence as a matter of law, using the following language:

> "A man has no right to be careless and reckless in the face of open and apparent danger, and if he proceeds under such circumstances, he is guilty of contributory negligence to a degree that bars a recovery. The load was secure until the deceased himself destroyed the security. In the case the evidence establishes contributory negligence so clearly as to admit of no other reasonable conclusion with regard thereto.
>
> "The rule in Federal courts is that, where there is no conflict in the evidence, or where no materially different inferences may be reasonably drawn from the evidence, a verdict in accordance with the law may be directed."

To the same effect is the holding of the Fifth Circuit Court of Appeals in the case of *Southern Ry. Co. v. Edwards*, 44 S. W. (2d) 526, in which the facts are strikingly similar to the facts of the case at bar since the poles were leaning a little bit toward the south on which side the poles were to be unloaded and wishing the poles to fall on the south side they cut the standards on that side by sawing them about half through above the cuffs and while the deceased was engaged in cutting the top wires on the north side with an axe and after he had cut two of those wires there was a crash and the poles fell on both sides with the result that the deceased was killed by the poles hitting him, and in which case the court held that the deceased was guilty of contributory negligence as a matter of law using the following language:

> "The condition which gave rise to danger to persons who might undertake the unloading of the car was open and visible, and any danger or risk therefrom to deceased was one which, as between deceased and his employer, was assumed by the foreman. * * *
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> "Whatever danger there was to one undertaking to unload the poles from the car, due to their condition when they were ready to be unloaded, was of a kind as likely to be appreciated by a person of ordinary intelligence, prudence and experience who might reasonably be expected to take part in the unloading as to any one acting for the shipper or carrier. * * * But whether there was or was not a practical way of avoiding that danger, the deceased was negligent in incurring a danger which was open and apparent. The danger was brought into play by deceased's own voluntary act, done with full knowledge of the situation dealt with and that it involved peril, We conclude that the evidence without conflict shows that the negligence of the deceased caused or proximately contributed to

his injury and death, with the result of barring the asserted right of recovery."

It thus appears that the respondent is faced with the dilemma that either there was no negligence upon the part of petitioner, or if there was any, then that the deceased participated therein and was guilty of contributory negligence under the uncontroverted evidence as a matter of law.

In view of the fact that there is no escape from the conclusion that if there was any negligence, deceased was guilty of contributory negligence, and that under the instruction of the court the jury could only consider contributory negligence in reduction of damages in the event that it had found that Riley was guilty of negligence causing or contributing to cause his death (R. 14-15) and the jury found that Riley was not guilty of negligence proximately causing or contributing to cause his death (R. 12-13), undoubtedly, petitioner has suffered irreparable injury in the amount of damages and this cause should be reversed by this Honorable Court.

POINT NO. III

The Court of Civil Appeals erred in holding that the judgment for Thirty Thousand and No/100 ($30,000.00) Dollars was not excessive.

Argument under Point No. III

The actual earnings of Mr. Riley were shown to average not more than One Hundred Eight and 13/100 ($108.13) Dollars per month. (R. 125-6.) He kept out for per-

sonal expenses about Ten to Fifteen Dollars per month (R. 122-3), and was sometimes out travelling expenses (R. 122), thus leaving net for his family a fair average of not exceeding Ninety-five and No/100 ($95.00) Dollars per month. In his hazardous occupation of a Bridge and Building gang member, he had an expectancy of 27.45 years. (R. 125.) He was as good to his wife as anybody would expect a husband to be and he was interested in the children and wanted to give them the best that he could, educate them, and always wanted them to go to Sunday School and church. (R. 121.) When he was working, he had to be away from home. (R. 121.)

The above gives the entire picture in so far as the measure of damages is concerned. The jury allowed a total of Thirty Thousand and No/100 ($30,000.00) Dollars, apportioning Fifteen Thousand and No/100 ($15,000.00) Dollars to the widow and Five Thousand and No/100 ($5,000.00) Dollars to each of the three minor children (R. 14) and judgment was entered accordingly. (R. 61-2.) The Court of Civil Appeals affirmed such judgment holding in its written opinion that it could not say the damages asessed were excessive in the absence of any fact in the record to show that the jury was actuated by any ulterior motive. (R. 134-6.)

It is the contention of petitioner that respondent was not entitled to recover a greater sum than would produce annually, for the wife during the 27.45 years life expectancy of her husband and for the children during the 9, 11 and 14 years, respectively, until they become 21 years of age, what the wife and children would reasonably ex-

pect from deceased had he lived, the principal sum so provided for the beneficiaries to be exhausted by such annual payment at the expiration of the deceased's life expectancy; in other words, such a sum as will purchase annuities equal to what they reasonably expected to receive from deceased during the period of 27.45, 9, 11 and 14 years, respectively*.

Discounting the gross proposed contributions of the deceased ($95.00 per month or $1176.00 per year) for the full period of his expectancy of 27.45 years (disregarding the fact that the minor beneficiaries would become of age in much shorter time) at the rate of 6% per annum, the monetary loss of the wife and children could in no event exceed Twelve Thousand One Hundred Ninety-five and 39/100 ($12,195.39) Dollars. Such sum subtracted from Thirty Thousand and No/100 ($30,000.00) Dollars leaves Seventeen Thousand Eight Hundred Four and 61/100 ($17,804.61) Dollars, which is certainly excessive for the pecuniary value of the nurture, care and education said children would have received from their father, especially in view of the fact that the deceased's work necessitated his absence from home while he was employed. The sum of Fifteen Thousand and No/100 ($15,000.00) Dollars was excessive for the wife, as was the sum of Five Thousand

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* The law is well settled: "* * * The measure of damages is compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased. In estimating this the earning power of money must be considered and an amount determined, which, capitalized at a reasonable rate of interest, would yield annually the same income the injured person might have expected from the deceased, using the interest and part of the capital from year to year. * * * In U. S. v. Boykin, 49 F. (2) 762, we again adopted the rae of six per cent per annum in awarding damages to a father for the death of his son. We consider that rate just and reasonable." **Sabine Towing Co., v. Brennan, 85 F. (2d) 478 (Fifth Circuit).**

and No/100 ($5,000.00) Dollars for each of the three children.

The excessiveness of the verdict is further illustrated by the fact that the income from Thirty Thousand and No/100 ($30,000.00) Dollars at 6%, or even at 4%, per annum would exceed the net income of Riley and at the end of the periods of expectancy, the principal sums would still be left untouched.

The amount of the verdict furnishes within itself the best evidence of its excessiveness, and showed that the jury was swayed by something besides the evidence. Clearly the judgment is grossly excessive and relief from this Honorable Court is fully merited on behalf of petitioner.

CONCLUSION

The state courts in this case have clearly refused to apply the law as established by the Federal courts to cases coming under the Federal Employers' Liability Act. An important principle of law is involved as to whether the doctrine of res ipsa loquitur is applicable under the facts of this case and a dangerous precedent will be established unless stopped by this Honorable Court in line with its previous holdings which the state courts should respect rather than ignore. The Federal precedents have also been disregarded in the matters of contributory negligence and the measure of damages. Such precedent should not be tolerated by this Honorable Court.

WHEREFORE, petitioner respectfully prays that this Honorable Court issue writ of certiorari so that on final

hearing hereof, the judgments of the state courts in this case may be reversed, to the end that uniformity may prevail and that justice may be done.

Respectfully submitted,

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